PUBLIC PROSECUTOR

v.

ORHAN OLMEZ

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
HASHIM YEOP SANI SCJ
EUSOFFE ABDOOLCADER SCJ
[CRIMINAL APPLICATION NO. 3 OF 1987]
22 APRIL 1987

CRIMINAL LAW AND PROCEDURE: *Courts of Judicature Act 1964 - Section 66 - Four questions for reference to Supreme Court - Only issue whether the first diplomatic note from the Turkish Embassy constitutes a waiver of immunity from jurisdiction - Whether diplomatic agent legally obliged to give evidence as a witness.*

Four questions under s. 66 of the Courts of Judicature Act 1964 were referred to the Supreme Court by the Public Prosecutor to decide on the merits of whether a matter involving a diplomatic agent, Mr. Tarik Yalvac, giving evidence solely for authentication of the legal documents in an extradition enquiry constitutes a waiver of immunity from jurisdiction. The gist of this diplomatic communication was that Mr. Yalvac would be present during the hearing of the proceedings "in his capacity as consul" and "solely for authentication of the legal documents". By virtue of Article 31(2) of the Vienna Convention the diplomatic agent is not legally obliged to give evidence as a witness and a waiver under the Convention must always be express - Article 32.2.

Held:

[1] The first diplomatic note is not an express waiver of immunity from jurisdiction of the Court in this country.

[2] Mr. Yalvac turned up in Court to give evidence in compliance with his Government's wishes and this does not constitute his submission or make him subject to our jurisdiction or render him obliged to give evidence or make him a compellable witness.

[3] Therefore, the learned Judge had erred and his order was accordingly set aside.

Legislation referred to:
Courts of Judicature Act 1964, s. 66
Diplomatic Privileges (Vienna Convention) Act 1966, arts. 29, 31(2), 32

Other sources referred to:
Oppenheim, 6th Edn., Vol. 1, pp. 387 & 388
Protection of Officials of Foreign States According To International Law, Franciszek Przetacznik, join p. 9
The Vienna Convention on Diplomatic Relations (1961)

For the public prosecutor/applicant - John O 'Hara (Lee Oi Kuan with him); Deputy Public Prosecutors
For the respondent - Karpal Singh; M/s. Karpal Singh & Co.

JUDGMENT

Hashim Yeop Sani SCJ:

We gave leave to the Public Prosecutor to refer to us four questions under s. 66 of the Courts of Judicature Act 1964 and then proceeded to hear the merits.

The four questions referred were as follows:

(1) Whether or not the learned Judge was right in law to hold that the act of the sending state allowing the diplomatic agent concerned to give evidence solely for authentication of the legal documents in an extradition enquiry, constitutes a waiver of immunity from jurisdiction under Art. 32 of the Schedule to the Diplomatic Privileges (Vienna Convention) Act 1966.

(2) If the answer to question 1 is in the negative, whether such diplomatic agent who has commenced to give evidence in Court willingly can in law at any time refuse to continue giving evidence and absent himself from attending Court without permission of the Court.

(3) If the answer to question 1 is in the affirmative, is it right in law for the learned Judge to hold that once a waiver of immunity from jurisdiction is given by a sending State, it cannot claim immunity at a later stage of the proceedings.

(4) In the circumstances of this case whether it is right in law for the learned Judge to order a subpoena be issued to the said diplomatic agent compelling him to attend Court on a specified date and that if he failed to attend Court on such date, a warrant of arrest be issued against him.

First some background facts. Some time in July 1986 the embassy of the Republic of Turkey in Kuala Lumpur requested for the extradition of a Turkish national who had been convicted of the offence of murder and sentenced to life imprisonment by their Court in Ankara.

On 19 December 1986 the extradition proceeding commenced in the Kuala Lumpur Magistrate's Court and one Mr. Tarik Yalvac, the first secretary to the embassy of the Republic of Turkey gave evidence in Court. Mr. Yalvac came voluntarily to the Court and no subpoena was issued for his attendance. His attendance however was preceded by a diplomatic note dated 19 December 1986 from his embassy to the Ministry of Foreign Affairs (Exhibit P20). After Mr. Yalvac completed his examination-in-chief he was cross-examined by Mr. Karpal Singh who was Counsel for the subject of the extradition proceeding. During the course of the cross-examination a question arose as to the correctness of the translation of certain documents sent by the Turkish government. The hearing was adjourned apparently to enable Mr. Yalvac to identify the translation with the right documents. On the same day the Turkish embassy sent another diplomatic note to the Ministry of Foreign Affairs stating that Mr. Yalvac would not be attending Court any more. When the learned Magistrate next sat Mr. Karpal Singh applied to the Court to issue a warrant of arrest to compel Mr. Yalvac's attendance. The learned Magistrate after hearing arguments held that a warrant of arrest could not be issued by virtue of Article 29 of the Vienna Convention.

Mr. Karpal Singh then wrote to the High Court to apply for a revision of the ruling of the learned Magistrate. The learned Judge after hearing arguments in open Court on 14 February 1987 delivered judgment on 19 February 1987 whereupon he exercised his power of revision and ordered that a subpoena be issued for Mr. Yalvac's attendance in Court on a specified

date for the purpose of giving evidence on the authentication of the extradition documents. The learned Judge further ruled that in the event of Mr. Yalvac's failure to attend Court on the date specified in the subpoena a warrant of arrest would be issued against him.

The Vienna Convention on Diplomatic Relations (1961) was ratified by Malaysia. Certain Articles of the Convention have been given effect and have the force of law in this country by virtue of the Diplomatic Privileges (Vienna Convention) Act 1966. These articles can be found in the Schedule to the Act which was deemed to come into force on 9 December 1965.

Of the four questions referred to us only question No. 1 forms in our opinion the crux of the matter. The only issue is whether the first diplomatic note from the Turkish embassy (Exhibit P20) constitutes a waiver of immunity from jurisdiction. It the answer to the question is in the negative then the remaining questions are of little consequence.

It is therefore important to look at the first diplomatic note and for convenience the same is reproduced below.

> The Embassy of the Republic of Turkey presents its compliments to the Ministry of Foreign Affairs and with reference to its Note No. 728-300 dated 18 December 1986, has the honour to inform the latter of the following:
>
> Upon the instructions of the Turkish Ministry of Foreign Affairs, with a view to fulfilling the legal requirements of the Malaysian authorities, Mr. Tarik Yalvac will be present during the case hearing of Mr. Orhan Olmez in his capacity as consul of this Embassy solely for authentication of the legal documents prepared and sent by the Turkish authorities as well as letters, notes and documents sent by this Embassy.
>
> In this connection, during the hearing, Mr. Yalvac will reply only to the questions pertaining to the authentication of the aforementioned legal documents. Mr. Yalvac will refrain from replying any other questions posed by either the Honourable Magistrate or other persons.
>
> The Embassy of the Republic of Turkey would be grateful if the foregoing is transmitted to the relevant Malaysian authorities before the hearing.
>
> The Embassy of the Republic of Turkey avails itself of this opportunity to renew to the Ministry of Foreign Affairs the assurance of its highest consideration.

Note that the gist in this diplomatic communication is that Mr. Yalvac would be present during the hearing of the proceeding "in his capacity as consul" and "solely for authentication of the legal documents". Also note that it was made clear that Mr. Yalvac would reply "only to the question pertaining to the authentication" and would "refrain from replying any other questions".

The second diplomatic note (Exhibit P21) also dated 19 January 1987 need not be reproduced here as the gist of the communication is only to inform the Ministry of Foreign Affairs that Mr. Yalvac would not be appearing in Court any more.

The restrictive language in the first diplomatic communication is clear and it cannot be construed as anything like a waiver of immunity. It was merely to express the diplomatic agent's **willingness** to give evidence voluntarily although he is not by virtue of Article 31(2) of the Convention legally **obliged** to give evidence as a witness:

A waiver under the Convention must always be express - Article 32.2.

The inviolability of the diplomatic envoys is universally accepted today. The theory and practice of international law agree nowadays that the receiving states have no right, in any circumstances whatever, to prosecute and punish diplomatic envoys. For a diplomatic envoy must never be considered to be under the legal authority of the receiving state.

It is said that diplomatic envoys are sacrosanct and the principle of their inviolability is generally recognised. There is however one exception. If a diplomatic envoy commits an act of violence which disturbs the internal order of the receiving state in such a manner as makes it necessary to put him under restraint for the purpose of preventing recurrence of similar acts, or if the diplomatic envoy conspires against the receiving state and the conspiracy can be made harmless only by putting him under restraint, he may be arrested for the time being, although he must in due time be safely sent home. See also *Oppenheim* Vol. I Sixth Edn. s. 387, 388.

This inviolability has been consecrated in Article 29 of the Convention. "Diplomatic agent" is defined in the Convention to mean the head of mission or a member of the diplomatic staff of the mission. Article 29 reads:

> The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

Franciszek Przetacznik's *Protection of Officials of Foreign States According to International Law* at p. 9 discusses the definition of personal inviolability of officials of foreign States:

> It should be observed that the definition of the personal inviolability of officials of foreign States contained in the Vienna Conventions and the Convention on Special Missions calls for clarification especially with respect to its details. The formulation that such an official is not liable to "any form of arrest of detention" might be construed as limiting the interdiction of the application of legal constraint only to "arrest and detention", while there exist still other measures of constraint which should not be applied with respect to foreign officials. Therefore, this principle should be formulated in a general way, so as to cover all measures of constraint. Moreover, the formulation that the receiving State "shall take" all appropriate steps seems too weak.

The sum total of the meaning of the personal inviolability of officials of foreign states may be stated as follows: on the one hand, it means a guarantee of non-application of measures of legal constraint with respect to their persons, and on the other hand, it also imposes on the receiving state the special duty not only to refrain by its organs from any acts infringing upon their personal inviolability, but also to take all appropriate step to protect them and prevent any attack on their persons, freedom and dignity.

The learned Judge in this case fell into error when he construed the first diplomatic note as an express waiver of immunity from jurisdiction of the Court in this country. It was not. The learned Judge was also of the opinion that the conditions stipulated in the diplomatic note with regard to the giving of evidence by Mr. Yalvac were contrary to the law and procedure in this country. This opinion cannot be sustained in view of the 1966 Act. Because of his view that the first diplomatic note contains an express waiver the learned Judge fell into the second error when he ruled that the Turkish embassy was not entitled to claim immunity for Mr. Yalval in the second diplomatic note.

Apart from the question of waiver, Mr. Karpal Singh argued - and his argument was accepted by the learned Judge - that by giving evidence Mr. Yalvac had submitted himself to the jurisdiction of our Court and as such he could no longer refuse to give further evidence with impunity. According to him, a warrant of arrest can therefore properly be issued to compel Mr. Yalvac to give evidence. In our view this contention is erroneous. Article 31(2) says "a diplomatic agent is not obliged to give evidence as a witness". This immunity belongs to his Government and not one which is personal to him. The power to waive the immunity and the extent of waiver is a matter for his state and so is the revocation of the waiver. When Mr. Yalvac turned up in Court to give evidence on 19 December 1986 he did no more than complying with his government's wishes as indicated in the first diplomatic note directing him to give evidence in our Court. In no way, would his act of giving evidence constitute his submission or make him subject to our jurisdiction or even render him obliged to give evidence or make him a compellable witness. Nothing short of his government abandoning him and stripping him off of diplomatic immunity would make him amenable to our jurisdiction.

We therefore answered the first question (and the only real issue in this reference) in the negative. The order of the learned Judge was accordingly set aside.

Also found at [1987] 2 CLJ 13